UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Felicia Burch, Scott Bloom, Matthew Burch, Jeffrey Ehlenz, Carol Gabriele, Nicole Graham, Jeffrey Kosek, Karen Zeeb, David Howard, Colleen Kist, Ronald Schneberger and Gena Margason, on behalf of themselves and other individuals similarly situated,

Plaintiffs,

v.

Qwest Communications International Inc., a Delaware corporation, Qwest Communications Corporation, a Colorado corporation, and Qwest Corporation, a Delaware Corporation,

Defendants.

No. 06CV3523-MJD/AJB

QWEST'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DECERTIFY THE FLSA AND RULE 23 CLASSES BASED UPON *WAL-MART V. DUKES*

PERKINS COIE LLP
Daniel C. Barr (*pro hac vice)*
M. Bridget Minder (*pro hac vice)*
Jill L. Ripke (*pro hac vice*)
2901 North Central Avenue
Post Office Box 400
Phoenix, Arizona 85001-0400

DORSEY & WHITNEY LLP
Robert Reinhart (#0090566)
Melissa Raphan (#0182795)
Ryan Mick (#0211960)
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402-1498
Attorneys for Defendants

TABLE OF CONTENTS

Page

Introduction 1

Facts 4

A. Qwest's Written Policies Prohibited Off-The-Clock Work. 4

B. Qwest's Policies Ensure Consultants Are Paid For Logging In To The Computer 5

C. Qwest's Policies Ensure Consultants Are Paid For Logging Out Of The Computer 8

D. Variability In Plaintiffs' Allegations Regarding Qwest's Practices 9

Memorandum of Law 20

I. DECERTIFICATION IS APPROPRIATE AND NECESSARY EVEN AT THIS STAGE IN THE LITIGATION 20

II. A HEIGHTENED STANDARD FOR RULE 23(A)(2) COMMONALITY APPLIES AFTER THE SUPREME COURT'S DECISION IN DUKES. 21

III. APPLYING THE DUKES STANDARD, PLAINTIFFS DO NOT HAVE SIGNIFICANT PROOF OF COMMON ANSWERS TO THE CENTRAL QUESTION IN THIS CASE. 23

A. Plaintiffs' Allegations Of The Alleged Practice To Require Computer Log In To Be Performed Off The Clock Vary Significantly 24

B. Plaintiffs' Allegations Of The Alleged Practice To Require Computer Log Out To Be Performed Off The Clock Vary Significantly 26

C. Plaintiffs Do Not Have A Class Of Individuals Who Suffered The Same Injury. 27

D. Plaintiffs' Allegations Of Qwest's Knowledge Of The Alleged Off-The-Clock Work Vary Significantly 28

IV. ALLOWING PLAINTIFFS' RULE 23 CLASS CLAIMS TO BE TRIED WITH REPRESENTATIVE DAMAGES VIOLATES THE RULES ENABLING ACT 30

V. PLAINTIFFS' FLSA COLLECTIVE ACTION CLAIMS SHOULD ALSO BE DECERTIFIED. 34

Conclusion 35

Introduction

In December 2009, this Court decertified a majority of the plaintiffs' proposed collective and class action "off-the-clock" claims because the factual variation underlying those claims did not meet the existing Rule 23 and FLSA requirements of commonality and similarity. [Dkt. #352, hereinafter "2009 Order"] The Court left one class and collective claim standing: Plaintiffs' claim that more than 2,400 call center employees in various states were required by Qwest—despite the absence of an express policy stating as much—to log in to and out of their computers every work day without pay. The Court certified an FLSA collective action and five state class action claims while at the same time noting the factual variances in call center locations, managers, and training. [*Id*. at 9-11, 28-32] Plaintiffs claimed that despite these variances and Qwest's express policies forbidding off-the-clock work, Consultants nonetheless believed they were required "in practice" to log in to their computers before the start of their shifts and log out after the conclusion of their shifts; and the allegation of this practice was sufficiently widespread and "susceptible to common proof" to require collective/class certification. [*Id*. at 32 and 35] This Court agreed, finding of particular significance that "the amount of time it takes to complete these tasks is unlikely to greatly vary among Plaintiffs." [*Id*. at 41] For this reason, the Court also held that rather than allow Qwest to assert defenses to each individual's claim, representative testimony of an undetermined number of class members would be used to determine liability and damages, and then extrapolated to the rest of the class. [*Id*. at 43]

Since the December 2009 Order, the parties have conducted additional discovery, which has revealed additional variations in Plaintiffs' claims. And importantly, the United States Supreme Court recently issued its decision in *Wal-Mart Stores, Inc. v. Dukes*, -- S.Ct. --, No. 10-277, 2011 WL 2437013 (June 20, 2011) (hereinafter "*Dukes*"), which heightened Rule 23(a)(2)'s commonality test to require that plaintiffs pursuing a class action must show a common question of law or fact, the answer to which "will resolve an issue that is central to the validity *of each one of the claims* in one stroke." *Id*. at *7 (emphasis added). The Court noted that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at *7 (internal citation omitted). *Plaintiffs* must also offer significant proof of a common class answer to close the conceptual gap between (1) an individual's allegation that he or she was harmed, (2) the company's policy caused that harm, and (3) the existence of a class of persons who have suffered the same injury as the individual named plaintiffs. *See id*. at *8. Finally, the Supreme Court held that the Rules Enabling Act forbids a "trial by formula," where a "sample set" of class member claims would be selected, validated, and then the number of valid claims would be extrapolated to the entire class without further individualized proceedings where defendants would have individualized defenses to plaintiffs' claims. *Id*. at *15.

When the evidence in this case is examined under the new standards set forth in *Dukes*, Plaintiffs' remaining log in/log out class claims must be decertified. The common question of fact that this Court relied on in certifying Plaintiffs' claim was whether Qwest had a uniform policy or practice requiring Consultants to log in to their computers before the beginning of their shifts and log out after the end of their shifts. [2009 Order at 48-49] But there is not significant evidence of a common answer to that question. Qwest had no companywide policy to this effect. To the contrary, its policies prohibited off-the-clock work and provided that Consultants would be paid for all time worked. The proof that Plaintiffs rely on, therefore, comes from anecdotal evidence, which one plaintiff admitted to be "educated guesses." [Dunn Dep. 59:5-17 attached at Ex. 1 to simultaneously filed under Barr Decl.][1] Not surprisingly, such evidence varies significantly. For example, some Plaintiffs admit they were paid for computer log in and out time under varying circumstances. Indeed, Plaintiffs' own expert characterized the large variations in Plaintiffs recollections about how long it took for them to log in and out of their computers as follows: "We only have highs and lows, and they're extremes . . . *I wanted to see if there was any predictable point for what the typicality would be and I couldn't find any*." [Schneider Dep. 56:11-19 (Ex. 2) (emphasis added)] Because the evidence is highly individualized, so are Qwest's defenses to Plaintiffs' claims. The highly individual nature of these claims is antithetical to the commonality requirements of Rule 23, and to the similarity requirements of the FLSA. For these reasons and the reasons discussed below, the Court should decertify Plaintiffs' log in and log out claims in this case.

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[1] Hereinafter, exhibits to the simultaneously filed Barr Decl. will be cited as "Ex. ___."

Facts

Qwest will not repeat the facts already familiar to this Court, which were set forth in previous filings and discussed in the Court's 2009 Order.[2] Instead, this section supplements those facts by describing Qwest's written policies prohibiting off-the-clock work, its computer log in and log out policies, as well as the evidence relating to Plaintiffs' claims obtained during discovery since the 2009 Order.

A. Qwest's Written Policies Prohibited Off-The-Clock Work.

Like Wal-Mart, which has a national policy prohibiting discrimination, Qwest has a national, written policy prohibiting off-the-clock work that was implemented in 2004. [Dkt. #308, Barr Decl. Ex. 6) ("[A]ll non-exempt management and occupational employees will be paid for all time worked.")] Qwest's policy makes clear that "[n]on-exempt Employees are required to report all time spent working outside of their scheduled shift, including overtime."[3] [*Id*.] Moreover, Qwest has a collective bargaining agreement requiring payment for overtime and providing grievance procedures for violations of the agreement. [Dkt. #308, Barr Decl. Exs. 2-5)] Before the filing of this lawsuit, there were no grievances filed through the union relating to off-the-clock work.[4] [Lynch Decl. ¶3 Dkt. #81, Barr Decl. Ex. B)]

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[2] *See generally* Mem. in Support of its Mot. for Decertification of Conditional Classes at 3-7 (Dkt. #307) and Resp. in Opp'n to Pls' Mot. for Class Certification at 3-11 (Dkt. #327).

[3] Each year Consultants reviewed Qwest's Code of Conduct, which stated that "Qwest is committed to full, fair and accurate disclosure" and there should be no "falsifying time reporting." [Dkt. #308, Barr Decl. Ex. 7] Named Plaintiff Felicia Burch admits that she falsified her time reports to Qwest. [Burch Dep. 67:25-68:9 (Ex. 3)]

Moreover, in 2005, Qwest, on its own initiative, conducted an internal investigation in its Denver call center to review compliance with its Off-The-Clock Work policy. As a result of the audit, Qwest conducted manager training in all of its call centers regarding the need to pay Consultants overtime for hours worked more than 40 in a workweek and reminded managers to ensure that Consultants logged in to their phone before they logged in to their computer.[5] This training further confirms that there was no classwide practice to allow, much less require, off-the-clock work.[6]

B. Qwest's Policies Ensure Consultants Are Paid For Logging In To The Computer.

Qwest had different policies regarding computer and phone log in during the relevant time periods. Under each policy, however, if Consultants followed Qwest's directions, they were fully compensated for their computer log in time.

Initial Policy

From the beginning of the relevant class period until the Start of Tour Huddles (discussed below), Consultants were trained to log in to the phone at the start of the shift and take their first call of the day while logging in to their computer and applications, ensuring that they were paid for the computer log in time.[7] If, however, they felt uncomfortable doing this, Consultants could place their phones on a status ("make busy" or "after call work") that prevented them from getting a call.[8] These practices ensured Consultants would be paid for computer log in time.

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[4] Qwest's collective bargaining agreement requires the payment of overtime of at least one and a half times the regular rate for hours worked in excess of 40 per week. [Dkt. #308, Barr Decl. Ex. 2 and 3]

[5] Dkt. #328, Ripke Decl. Ex. 15, filed under seal; *see also* Review of Office Policies/Procedures—Manager Talking Points (Ex. 4); DiLoreto Decl. ¶15 (Dkt. #81, Barr Decl. Ex. B) (Director of Portland Call Center stating all call center employees participated in training regarding off-the-clock work in March 2006).

Start Of Tour Huddles

"Start of Tour Huddles" were implemented between December 2006 and September 2007, depending on the call center.[9] Under this system, Consultants began their tours either five or fifteen minutes before they were scheduled to be available to take calls (previously, the start of a Consultant's tour and the time he or she was scheduled to be available to take calls was the same). On Tuesday through Friday, each Consultant's tour began 15 minutes before he or she was scheduled to be available to take

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[6] One Plaintiff admits that after this training occurred he no longer worked off the clock. [Schneberger Dep. 72:19-73:2, 5-12 and 74:13-25 (Ex. 5)]

[7] *See* Evered Decl. ¶7 (Dkt. #81, Barr Decl. Ex. B); Sandaval Decl. ¶11 (*Id.*); Thomason Decl. ¶10 (*Id.*); Margason Dep. 54:7-14 (admitting it was Qwest's expectation that she log in to her computer and phone at the same time) (Ex. 6); Nance Dep. 23:10-20 (admitting in training she was taught to log in to the phone first) (Ex. 7); Johnson Decl. ¶7 (Dkt. #328, Ripke Decl. Ex. 6) (paid for time spent logging in to the computer); McGinnity Decl. ¶¶10, 11 (*Id.* at Ex. 7) (same); Ramirez Decl. ¶¶7, 8 (*Id.* at. Ex. 10), Sutter Decl. ¶8 (*Id.* at Ex. 11); Declaration of William Ellingston ¶3 (Ex. 8).

[8] CON033 Audit interview of Carole Weir ("They may sit in after call work time until computer boots up.") (Ex. 9); Ex. 8 at ¶4 (after consultant logged in to the phone, the phone was put into "make busy," or after call work, to prevent him from getting calls).

[9] Supplementary Resp. to Plaintiffs' Interrogatories dated November 21, 2007 (Dkt. #446, Morgan Aff. Ex. 7 (filed under seal). The Oregon call center closed in October of 2006, prior to implementation of Start of Tour Huddles.

calls; the Consultant was paid for these 15 minutes, and the time was used to boot up and log in to the computer (five minutes) and for team "huddles" (or meetings) (10 minutes). [Olvey Decl. ¶¶8-10 (Dkt. #81, Barr Decl. Ex. B)] On Monday, each Consultant's tour began five minutes before he or she was scheduled to be available to take calls to allow for computer log in time. [*Id*.] If Consultants followed this policy, they were paid for all computer log in time even if it extended longer than five minutes (because they had already started to be paid for the day). The implementation of the Start of Tour Huddles furthered Qwest's goal of ensuring that Consultants adhered to its Off-the-Clock policy and its promise in the CBA that Consultants "will be paid for all time worked."

Avaya Phone System

Between August 2007 and February 2008, Qwest implemented a phone system manufactured by Avaya in its call centers.[10] Avaya is a "soft phone," meaning that it operates through a computer. After the implementation of Avaya, a Consultant would log in to his or her computer and the computer would automatically log in to the Consultant's phone.[11] This alerted the Resource Allocation department that the individual was logged in to the phone, and thus being paid.[12]

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[10] The Avaya phone system was implemented in different call centers at different times. [Defs.' Rsp. To Pls.' Interrogs. To Defs.—Set III (Ex. 10); Defs.' Supp. Resp. to Pls.' Interrogs. to Defs—Set III (Ex. 11)] The Washington and Oregon call centers closed in 2006, before the implementation of the Avaya system.

[11] Lindner Dep. 9:22-10:14 (Ex. 12); 2/18/11 Olvey Dep. 29:4-8 ("Q. And at some point thereafter, in fact, today, the consultant doesn't need to do that anymore, he or she can log into the computer and Avaya automatically opens? A. Correct.") (Ex. 13).

[12] *Id*. at. 22:25-23:16 (Total View and Avaya are connected so that Total View sees when the Consultant is automatically logged in to Avaya).

In addition, Qwest's policy is to pay Consultants for five minutes at the start of their scheduled shift for computer log in.[13] Even if the process were to take longer than the allocated five minutes; the Consultant is paid beginning at the scheduled start time. The combination of the Avaya phone system, which automatically logs a Consultant in to the phone, and thereby the Total View monitoring system (described in Dkt. #327), with the policy of paying for five minutes for computer log in time, eliminates the possibility of any off-the-clock work for computer log in time. Plaintiffs' expert, Dr. Stephen Schneider, agrees.[14]

C. Qwest's Policies Ensure Consultants Are Paid For Logging Out Of The Computer.

Unlike Qwest's policies regarding computer and phone log in, the policies regarding computer log out have not changed significantly during the relevant time period. Consultants were trained to log out of their computers before logging out of the

[13] *See e.g.*, 2011 St. Paul Work Force Management Policies p. 8 ("Each employee will have 5 minutes of closed time at the start of their tour each day. This time is intended to allow enough time to log into the computer, Qwest systems and the Avaya phone.") (Ex. 14); 2010 Littleton SBG Sales and Sales & Service p. 10 (same) (Ex. 15).

[14] Ex. 2 at 85:11-15 ("So my question is, would you agree that once they're logged in to their phone, it doesn't matter then how much longer the logon process lasts as long as they're getting paid? A. That sounds logical to me.").

phone.[15] Indeed, some Plaintiffs admit they followed their training and were paid for logging off the computer.[16]

In 2008, in response to a union grievance regarding computer log out time, Qwest performed an internal, informal study regarding computer log out practices. One of Qwest's Labor Relations managers found it takes 30 to 60 seconds to get the computer to a state in which it is safe to leave the computer for the day. [Sept. 2, 2008 letter from Davidson to Marsden (Ex. 30)] Moreover, employees were, and continue to be, instructed to record all time worked. [*Id.*] This evidence demonstrates Qwest's practice to pay for computer log out time.

D. Variability In Plaintiffs' Allegations Regarding Qwest's Practices.

There is significant variability in Plaintiffs' allegations of (1) whether a Consultant worked off the clock, (2) the amount of unpaid time for computer log in and out, (3) Qwest's alleged practice of requiring off-the-clock work, and (4) Qwest's knowledge of Plaintiffs' alleged off-the-clock work. Indeed, Plaintiffs' own expert stated that the allegations of unpaid time were so variable that "I wanted to see if there were any predictable point for which the typicality would be and I couldn't find any." [Ex. 2 at 56:11-19] These wide variances were evident from just the few members who provided deposition testimony, responses to interrogatories or declarations (about 2% of the class).

[15] Bina Dep. 49:18-20 (Ex. 16); Johnson Decl. ¶12 (Dkt. #328, Ripke Decl. Ex. 6), McGinnity Decl. ¶16 (*Id.* at Ex. 7), Ramirez Decl. ¶13 (*Id.* at. Ex. 10), Sutter Decl. ¶13 (*Id.* at Ex. 11); Ex. 8 at ¶¶14-15.

[16] Ex. 16 at 15:22-24 (Plaintiff did not perform any uncompensated work after the end of her shift) and 46:23-47:14; C. Peterson 20:19-24 (before the Avaya phone system, he did not work any uncompensated time logging off of the computer) (Ex. 17).

Testimony from the remaining 98% of the class members would show additional, and perhaps wider, variability. The variations of evidence fall into four categories.

First, there is a large variability in whether each individual Plaintiff, on each day that he or she worked at Qwest, worked unpaid time logging in to and out of the computer. Indeed, a number of class members admit they were paid for all, or some, of their computer log in time in a variety of different circumstances. For example:

- Three former St. Paul Consultants and two former Colorado Consultants state they were paid for all of their computer log in time. [Ex. 8 at ¶¶5-8, Johnson Decl. ¶7, McGinnity Decl. ¶10, Ramirez Decl. ¶7, Sutter Decl. ¶7 (Dkt. #328, Ripke Decl. Exs. 6-8, 10-11)]
- Plaintiff Jeske admits that when she was running late, she logged in to her phone (and was therefore paid) before she logged into her computer applications. [Jeske Dep. at 15:9-16:15 (Ex. 18)]
- Plaintiff Gardner admits that sometimes she opened up her computer applications while she was on her first call of the day (as she was trained to do), and therefore was paid for her computer log in time. [Gardner Dep. 24:5-15 (Ex. 19)]
- Plaintiff Schneberger admits that after February 2006 he did not work off the clock. [Ex. 5 at 73:21-24 and 74:13-25]
- Plaintiff Christian Peterson admits that after a team meeting with manager Kelly Johnson he no longer performed activities before his shift, he did them after his shift started. [Ex. 17 at 55:2-56:2]

Other class members admit that if they performed work before their scheduled shift, it was without Qwest's knowledge. For example:

- Plaintiffs Allen and Bailey admit that if they were off the phone, management could not tell if they were working. [Dkt. #308, Barr Decl. Ex. 16 at 84:18-85:4, Bailey Dep. 52:6-14 (Ex. 20)]

And, other class members admit they were paid for some, or all, of their computer log out time in a variety of different circumstances. For example:

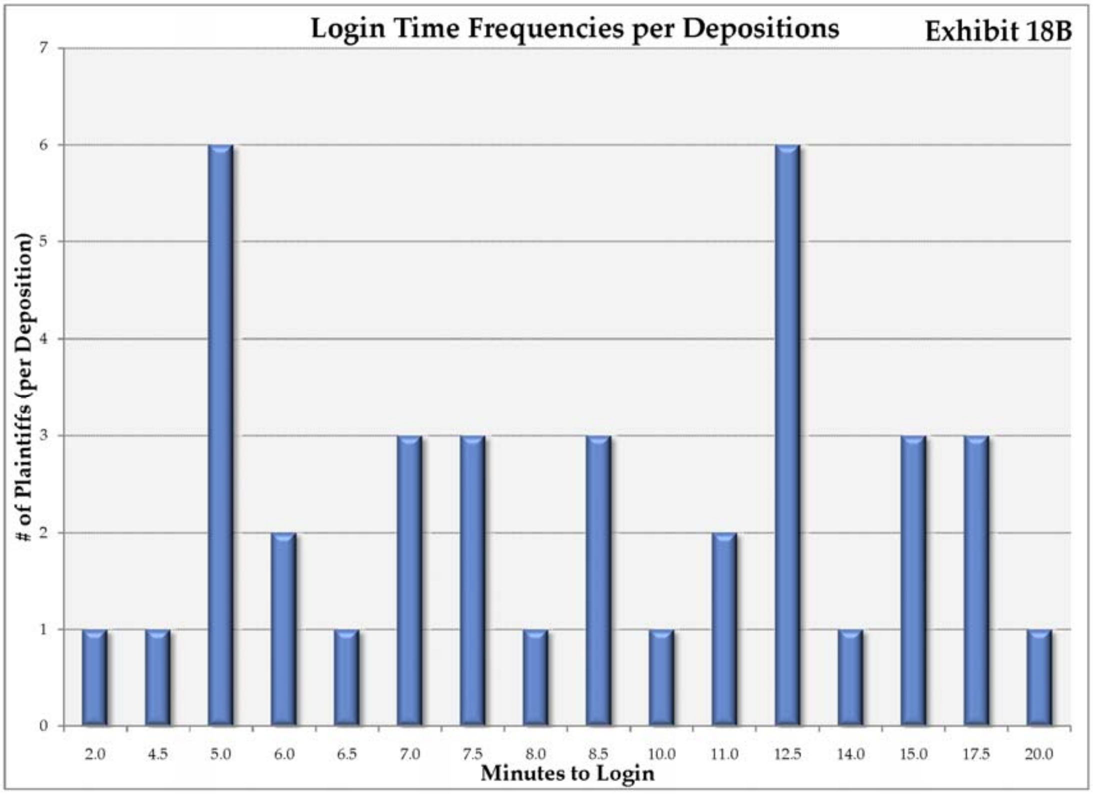
- Plaintiff Bina admits that she did not perform work off the clock after her scheduled shift ended and was trained to log out of computer prior to logging out of phone. [Ex. 16 at 15:21-24 and 49:18-20]
- Former St. Paul Consultant William Ellingson was compensated for his computer log out time because he followed Qwest's management's instruction that he "put my phone on 'make busy,' shut down my computer, and then logged out of my phone." [Ex. 8 at ¶13-15]
- Plaintiff Dunn shut down computer programs, logged off her phone, then logged out of the computer, and therefore was paid to close the computer programs. [Dunn's Responses to Defendants' Third Set of Interrogatories, Response #3 (Ex. 21)]
- Plaintiff Felicia Burch admits that, for a portion of her claim period, approximately two times a week she was compensated for her computer log off time. [Ex. 3 at 40:5-15]

- Plaintiff Edward Peterson was paid for computer log off time that was part of his scheduled time, but only reported additional time if it was five minutes or more because he "wasn't trying to milk three minutes out of the company." [E. Peterson Dep. 37:4-22 (Ex. 22)]

Second, Plaintiffs' allegations about the amount of time it took to perform both tasks range significantly—from a few minutes a day to 35 minutes a day. For example:

- Plaintiff Felicia Burch claims two to eight minutes to log in to the computer and two to eight minutes to log out. [Ex. 3 at 29:5-12 and 42:18-20]
- Plaintiffs Kist and Howard claim 15-20 minutes to log in to the computer and 10-15 minutes to log out. [Kist Dep. 39:13-20 and 41:17-20 (Ex. 23), Howard Dep. 18:10-21; 24:17-20 (Ex. 24)]
- Plaintiff Bloom claims 10-15 minutes to log in. [Bloom Dep. 26:14-19 (Ex. 25)]
- Plaintiff Dunn claims five minutes to log out. [Ex. 1 at 31:11-16]

A summary of the variability of Plaintiffs' computer log in allegations is shown below.


Login Time Frequencies per Depositions
Exhibit 18B
# of Plaintiffs (per Deposition)
0
1
2
3
4
5
6
7
2.0
4.5
5.0
6.0
6.5
7.0
7.5
8.0
8.5
10.0
11.0
12.5
14.0
15.0
17.5
20.0
Minutes to Login

[Dkt. #451, Barr Decl., Ex. 2 at Ex. 18]

In addition to the different recollections, this variability may have occurred for additional reasons that are individualized to each Plaintiff. For example, some Consultants used a program called Intelligent Desktop (or IntelliDesk) which *automatically* opened the computer programs.[17] One Plaintiff admitted that IntelliDesk

[17] Introduction to the Workstation at 13 ("IntelliDesk has the ability to automatically start the Legacy systems that you use when the computer starts. This will save time at the beginning of each day.") (Ex. 26).

saved a significant amount of time during the log in process.[18] Others claim that they chose not to use the program or partially used the program.[19]

Another potential reason for this variability is that Qwest instructed Consultants to restart their computers at the end of their shift so that they would be ready the next day.[20] Some of the deposed Plaintiffs admit that they followed this guideline while others failed to do so. For example:

- Plaintiffs Gardner and Graham restarted their computers at the end of their shifts. [Ex. 19 at 20:23-21:17 and Graham Dep. 24:13-20 (Ex. 27)]
- Plaintiffs Bloom, Dunn and Jeske allege that they did not restart their computers at the end of their shifts. [Ex. 25 at 18:2-9, Ex. 1 at 24:19-25:4, Ex. 18 at 10:18-23]
- Plaintiff Howard claims that he did not do a restart at the end of his shift because he was told to shut down completely. [Ex. 24 at 15:18-16:4]

Moreover, the size of each Consultant's roaming profile[21] could affect the length of log in time, which depended on the amount of data the user stored on the desktop.

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[18] Ex. 1 at 30:10-17.

[19] Ex. 19 at 27:8-28:12 (did not use IntelliDesk), Ex. 27 at 26:5-24 (used IntelliDesk to open three programs automatically each day).

[20] Frequently Asked Questions (Ex. 28); Proper Shutdown/Logoff in iD (Ex. 29); Introduction to the Workstation at 20 (Ex. 26).

[21] A roaming profile allows a Consultant to log in to any computer on the Qwest network, access their documents and have a consistent desktop experience. How long the roaming profile took to load depended on the documents saved to the roaming profile by the user.

[Solomon Dep. at 38:3-39:6 (Ex. 31)] Some Consultants admitted to storing items on their desktops. For example:

- Plaintiff Bloom had pictures of his daughter, a Minnesota Wild hockey team desktop background, and some pictures of the University of Minnesota Golden Gopher hockey, basketball and football teams on his desktop. [Bloom's Response to the Third Set of Interrogatories, #6 (Ex. 32)]
- Plaintiffs Felicia Burch and Sandy Gardner had personal screensavers on their desktops. [F. Burch's Response to the Third Set of Interrogatories, #6 (Ex. 33), Gardner Response to the Third Set of Interrogatories, #6 (Ex. 34)]
- Plaintiff Christian Peterson had pictures, desktop backgrounds, and music saved on his desktop. [C. Peterson's Response to the Third Set of Interrogatories, #6 (Ex. 35)]

Third, Plaintiffs allegations regarding the practices followed in their particular call center vary widely. For example:

- Oregon Plaintiff Allen admits that managers never told her to work without being paid. [Ex. 36 at 87:7-10]
- Minnesota Plaintiffs Bina and Christen Peterson admit that managers never told them to log in to the computer before the start of their shifts. [Ex. 16 at 38:3-24, Ex. 17 at 50:15-51:1]

- Colorado Plaintiff Dunn admits that managers never told her to work without being paid, but alleges that an unknown manager instructed her to log in to the computer so she could take calls at 8 a.m. [Ex. 1 at 24: 8-18 and 24:19-25:13]
- Minnesota Plaintiff Graham does not recall management telling her not to record overtime for computer log in. [Ex. 27 at 23:2-16]
- Oregon Plaintiff Schneberger admits that Qwest did not require him to be there prior to the start of his shift. [Ex. 5 at 36:16-18]
- Former Consultant Ellingson states that the training and actual practice at the St. Paul call center was that Consultants were to be logged in to the phone before logging in to the computer at the start of the shift. [Ex. 8 at ¶5]

Others admit that Qwest instructed them to record all overtime and not to perform any off-the-clock work. For example:

- Plaintiff Keller admits that supervisors told her to record all her overtime and not to work off the clock. [Keller Dep. 110:7-14 (Ex. 37)]
- Five former Consultants state that no one instructed or encouraged them to work before or after their scheduled shifts and received specific instructions that off-the-clock work is not allowed. [Johnson Decl. ¶¶13, 19 (Dkt. #328, Ripke Decl. Ex. 6), McGinnity Decl. ¶¶18, 22 (*Id.* at Ex. 7), Ramirez Decl. ¶¶14, 22 (*Id.* at Ex. 10), Sutter Decl. ¶¶14, 22 (*Id*. at Ex. 11); Ex. 8 at ¶6]

Others claim that the "reality" was that they had to log in to the computer before the start of their shift or that they assumed that Qwest wanted them to log in to the computer early. For example:

- Plaintiff Nance testified that Qwest instructed her to log in to the phone before her computer, but she felt that "in the real world" she had to have the computer and applications up before taking a call. [Ex. 7 at 23:14-24:4]
- While his manager did not tell him to log in to the computer early, Plaintiff Flynn assumed that the manager wanted him to do so. [Flynn Dep. 16:10-17:1 (Ex. 38)]
- Plaintiff F. Burch admits that she was not told to log in to the computer before the phone but states that "it was just the norm." [Ex. 3 at 31:22-25]
- Plaintiff Godfrey admits that no one told him to log in to the computer before the start of his shift, but claims that he had to be there before his shift began to log in to his computer. [Godfrey Dep. 26:2-27:9 (Ex. 39)]
- Plaintiff Mayor alleges that local managers told him that if he decided to log in to the computer after the start of his shift that it would impact his availability. [Mayor Dep. 11:7-13 (Ex. 40)]
- Plaintiff Gardner admits that Qwest management never told her to log in to her computer early, but she inferred it from the instruction to be ready to take calls. [Ex. 19 at 37:19-38:14]

Fourth, there is large variability in Plaintiffs' allegations of Qwest's knowledge of their alleged off-the-clock work. As an initial matter, Consultants were monitored locally. Individuals working in Qwest's Resource Allocation department monitor Consultants' statuses in the Total View software program after the Consultant logs into the phone. [Dkt. #308, Barr Decl. Ex. 31 at 39:7-18; 39:25-40:6] Total View does not monitor Consultants when they are logged off their phones. Local managers supplement the local Resource Allocation's monitoring efforts by routinely walking the call center floor to monitor Consultants' adherence to their schedules, including preventing Consultants from working while logged out of their phones. *See generally*, Qwest's May 23, 2007 Class Cert. Resp. at 24-26 (Dkt. #80) (discussing numerous methods by which Qwest monitors schedule adherence).

Many local managers submitted declarations stating that they did not know of alleged off-the-clock work. For example:

- Minnesota Coach Artis states that Consultants are encouraged to report all overtime and he had no knowledge of off-the-clock work for four named Plaintiffs, whom he supervised. [Artis Decl. ¶¶2-10 (Dkt. #81, Barr Decl., Ex. B]
- Director of the Denver Small Business Center Baldwin did not have knowledge of off-the-clock work. [Baldwin Decl. ¶12 (Dkt. #81, Barr Decl., Ex. B]

- Director of St. Paul Small Business Center Evered regularly reminds employees about Qwest's prohibition against off-the-clock work. [Evered Decl. ¶20 (Dkt. #81, Barr Decl., Ex. B)]
- Minnesota Coach Johnson did not receive any complaints about off-the-clock work from the Plaintiffs he supervised. [Johnson Decl. ¶9 (Dkt. #81, Barr Decl, Ex. B)]
- Former Director of Denver Consumer Call Center Kavanah reminded employees about Qwest's prohibition against off-the-clock work and did not see various opt-in Plaintiffs work off the clock. [Kavanah Decl. ¶¶7, 10 (Dkt. #81, Barr Decl., Ex. B)]

Yet, Plaintiffs allege that some managers were aware of their off-the-clock work.

- Plaintiffs Ahmed and Gabriele claim that local St. Paul managers were aware of their respective off-the-clock work. [Ahmed Decl. ¶12 and Gabriele Decl. ¶12 (Dkt. #43, Fleegel Aff., Ex. D at 1-2 and 11-12)]
- Plaintiff Howard alleges that local Denver manager was aware of his off-the-clock work. [Howard Decl. ¶12 (Dkt. #43, Fleegel Aff., Ex. D at 21-22)]

Moreover, while many managers state that if they saw off-the-clock work, they took action to pay for the work and prevent it from occurring again, other managers submitted declarations stating the opposite.

- Former Consultant and former Coach Ellingson told Consultants that they should not work off the clock and on the few occasions he saw off-the-clock work, he made sure that the Consultant's pay was adjusted to compensate them for additional time. [Ex. 8 at ¶22]

- Coach Johnson stated that if he saw Consultants at their desk at a time they should not be, he would ask them if they are working and if so, he would make sure that they reported their time appropriately. [Dkt. #328, Ripke Decl. Ex. 6, ¶18]
- Coach McGinnity stated that if he saw a Consultant doing a work-related task outside of his or her shift, he would make sure that the Consultant was paid for the time and tell the Consultant that he or she could not do such tasks outside of the shift. [Dkt. #328, Ripke Decl. Ex. 7, ¶12]
- Colorado Site Director Denzin took action when he saw off-the-clock work. [Denzin Dep. 22:19-23:15 (Ex. 41)]
- Former Des Moines Coaches Baumhover and Lutman and former Idaho Falls Coach Brediger claim they saw off-the-clock work but did not take action. [Baumhover Decl. ¶¶4-6 (Dkt. #315, Fleegel Aff. Ex. 36); Brediger Decl. ¶¶4-7 (*Id*. at Ex. 38); Lutman Decl. ¶5 (*Id*. at Ex. 43)]

Memorandum of Law

I. DECERTIFICATION IS APPROPRIATE AND NECESSARY EVEN AT THIS STAGE IN THE LITIGATION.

A class can be decertified whenever it becomes apparent that class treatment is inappropriate, including at the end of trial. *See Briggs v. Anderson*, 796 F.2d 1009, 1017 n.2 (8th Cir. 1986); *see also* Fed. R. Civ. P. 23(c)(1)(C); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:6 (7th ed. 2011) ("Prior to entry of final judgment, . . . the district court has an unflagging obligation to intervene at any time—even during trial—if it becomes apparent that certification is inappropriate.").

II. A HEIGHTENED STANDARD FOR RULE 23(A)(2) COMMONALITY APPLIES AFTER THE SUPREME COURT'S DECISION IN *DUKES.*

In *Dukes*, the Supreme Court announced a heightened standard in determining whether a class meets the requirements of Rule 23(a)(2), which requires that a plaintiff show that "there are questions of law or fact common to the class." The Supreme Court stated that the "language [of Rule 23(a)(2)] is easy to misread since [a]ny competently crafted class complaint literally raises common questions." *Dukes*, 2011 WL 2437013 at *7 (internal quotations omitted).

In clarifying this language, the Supreme Court explained that Rule 23(a)(2) commonality means that plaintiffs seeking to pursue class treatment must show "a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. Put another way, after *Dukes*, to meet the Rule 23(a)(2) commonality test, a plaintiff must show that there are: (1) common questions that are central/crucial to the resolution of the issue(s) in the case, and (2) common answers to this central/crucial question. *Id*. In order to make this determination, the court should conduct a "rigorous analysis" which "[f]requently . . . will entail some overlap with the merits of the plaintiff's underlying claims." *Id*. This rigorous analysis includes making a determination about whether plaintiffs can "demonstrate that the class members 'have suffered the same injury.'" *Id*.

In addition, the Supreme Court stated that "mere claim[s]" by plaintiffs of a common contention, are not enough as Plaintiffs must offer significant proof that the answer is common to the class." Id. at *7-8. Indeed, "[a] party seeking class certification must affirmatively demonstrate his compliance with [] Rule [23]—that is, he must be prepared to prove that there are *in fact* . . . common questions of law or fact." *Id*. at *7.

The *Dukes* test is a significant departure from the cases cited in Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification ("Mot. for Certification") (filed under seal, Dkt. #314), which focused only on the first prong of the test (common questions). For example, Plaintiffs cited (at 17) *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982), in which the Eighth Circuit found that the question of whether an employer "discriminated against black employees" met the commonality test, despite the fact that the district court found that "the evidence fail[ed] to substantiate this charge" and there were "factual variations" that "affect[ed] individual employees in different ways." Additionally, Plaintiffs cited (at 17) *Jones v. CBE Group, Inc*., 215 F.R.D. 558, 568 (D. Minn. 2003), for the proposition that "if the legal question [class members] share in common is related to the determination of the litigation, the commonality requirement is met." After *Dukes*, however, a common question is no longer enough to satisfy Rule 23(a)(2). The question must be central to the resolution of the issues in the case and there must also be significant proof of a common *answer* to the central question.

In addition to announcing a heightened test for Rule 23's commonality requirement, the Supreme Court held that, where a defendant has individualized defenses to plaintiffs' claims, the Rules Enabling Act forbids "Trial by Formula," where a "sample set" of class members is selected, validated, and the number of valid claims extrapolated to the entire class. *Id*. at *15.

III. APPLYING THE *DUKES* STANDARD, PLAINTIFFS DO NOT HAVE SIGNIFICANT PROOF OF COMMON ANSWERS TO THE CENTRAL QUESTION IN THIS CASE.

In its 2009 Order, the Court found that Plaintiffs met the Rule 23(a)(2) commonality requirement because of the *allegations* Plaintiffs made that

> they were forced to work off the clock because of Qwest's general policy, monitoring systems, and reporting practices. They *claim* that Qwest's particular system of starting shift time based on being logged into the telephone and being ready to take calls, even though employees must boot up in order to be ready for the start of shift and must shut down after logging out of the telephone, creates widespread state law overtime violations.

[2009 Order at 48-49 (emphasis added)] Put another way, the central issue in this case is whether the Plaintiffs, as a class, were required to work off the clock. And, there is no significant proof of a common answer to this question. Qwest has no classwide policy to this effect. Its policies prohibit off-the-clock work and provide that Consultants be paid for time spent logging in and out of the computer. *See supra* Fact Section A.

Contrary to Qwest's written policies, union contract and established practices discussed above, Plaintiffs allege, with dissimilar anecdotal evidence, that Qwest's lawful policy of requiring Consultants to be available to take calls at the start of their shift resulted in Plaintiffs, *as a class*, inferring that Qwest really required them to work off the clock. In addition, Plaintiffs claim that they were required to log out of the computer off the clock. For both of these claims, Plaintiffs' allegations vary significantly, showing that there is no common *answer* to the central questions in this case of whether Plaintiffs, as a class, were required to perform off-the-clock work or that Qwest knew about such work. In addition, the evidence shows that Plaintiffs do not have the same injury—another factor that precludes certification.

A. Plaintiffs' Allegations Of The Alleged Practice To Require Computer Log In To Be Performed Off The Clock Vary Significantly.

As an initial matter, Plaintiffs have no evidence, much less significant proof, that the alleged practice to require Consultants to have their computer applications loaded in order to be ready to take calls at the beginning of their shift was a classwide practice. More importantly, Plaintiffs cannot show with significant proof that there is a common *answer* to whether there was a common practice to require computer log in to be performed off the clock. *Dukes*, 2011 WL 2437013, at *7.

For example, several current and former managers testified that Qwest's practice was to pay Consultants for computer log in time. *See supra* Fact Section B. And, some of the Plaintiffs admit that they were not told by Qwest that they needed to log in to the computer before the start of their shift. *See supra* Fact Section B.

Plaintiffs likewise cannot meet their burden of common proof by alleging a common inference, i.e., that Consultants inferred from being required to start/end their shifts on time that they had to be logged in or out before then. The evidence does not show that. A number of Plaintiffs did not infer anything at all. They took Qwest training not to work off the clock literally, and did not believe they needed to log in or out before or after their shift. For example, former St. Paul Consultant William Ellingson logged in to his phone before logging in to his computer and thus was paid for all his computer log in time. [Ex. 8 at ¶¶3-7, 10-12] Others admitted that despite anything they were told by Qwest (such as not to work off the clock, and that incidental overtime would be paid), they would borrow from "real world" experience and log in early. *See* Ex.7 at 23:14-24:4 (Qwest instructed her to log in to the phone before her computer, but she felt that "in the real world" she had to have the computer and applications up before taking a call). This is hardly a logical inference that should be imputed to the whole class and overcome the requirements of Rule 23.

Even with the testimony from some Plaintiffs that they made the inference that off-the-clock work was required, it is not enough. There must be some evidence to bridge the gap between their individual allegations and a classwide policy to require the work. *Dukes*, 2011 WL 2437013, at *8. Plaintiffs do not have significant proof to demonstrate that Qwest operates under a general policy to require Consultants to log in to the computer and applications without pay. *Id*. at *10. Without significant proof of the alleged practice to require uncompensated computer log in time, Plaintiffs cannot answer the central common question with a common answer—precluding certification. *Id*. at *7 (where it is "impossible to say that examination of all class members' claims for relief will produce a common answer to the crucial question").

B. Plaintiffs' Allegations Of The Alleged Practice To Require Computer Log Out To Be Performed Off The Clock Vary Significantly.

In Plaintiffs' Reply in Support of Class Certification, they claimed that they "were required to shut down their computers and log out of several computer applications at the end of their shifts." [Dkt. #340 at 10] But, there are no claims, much less significant evidence, that there was a *classwide Qwest policy* that required Consultants to log off their computers *off the clock*. Without such a requirement, Plaintiffs cannot show that there is a common answer to the central question of whether the class was required to log out of the computer off the clock. *See Dukes*, 2011 WL 2437013, at * 11 (plaintiffs claim "must depend upon a common contention" that is "capable of classwide resolution").

The evidence shows that not only were Consultants trained to log out of their computers before logging out of their phones,[22] but when Consultants followed Qwest's instruction, they were paid for logging off the applications and computer. For example, Minnesota Plaintiff Janis Bina admits that she did not work off the clock when logging out of the computer. [Ex. 16 at 15:22-24 and 46:23-47:14] Minnesota Plaintiff Christian Peterson admits that prior to the Avaya phone system, he did not work any uncompensated time logging out of the computer. [Ex. 35 at 20:19-24] Their testimony is in stark contrast to Plaintiffs such as Colorado Plaintiff Colleen Kist who claims that it took her 10-15 minutes of uncompensated time to log out of her computer. [Ex. 23 41:17-42:5 and 42:15-24]

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[22] Ex. 16. 49:18-20; Johnson Decl. ¶12 (Dkt. #328, Ripke Decl. Ex. 6), McGinnity Decl. ¶16 (*Id*. at. Ex. 7), Ramirez Decl. ¶13 (*Id*. at Ex. 10), Sutter Decl. ¶13 (*Id*. at. Ex. 11); Ex. 8 at ¶¶3-5.

Without significant proof of the alleged practice to require uncompensated computer log out time, Plaintiffs cannot answer the central common question with a common answer, barring certification of the claim.

C. Plaintiffs Do Not Have A Class Of Individuals Who Suffered The Same Injury.

Rule 23(a)(2) commonality requires Plaintiffs to demonstrate that they "suffered the same injury." *Dukes*, 2011 WL 2437013, at *7. Moreover, "the same employment practices" should "touch and concern all members of the class." *Id*. at *11.

Even if Plaintiffs' testimony were true, Plaintiffs did not suffer the same injury because there were varying reactions by different class members to Qwest's policies and practices regarding computer log in and log out[23] and importantly, wholly different estimates about how much time they spent logging in and out. *See infra* Section IV. Even if there were some practice to require off-the-clock work, Plaintiffs' testimony demonstrates it was neither consistent for all Consultants in the class as different Consultants reacted to Qwest's policies in different ways nor was it constant throughout the class certification period.

As discussed above at Fact Section B and C, there is a large variability in the allegations regarding whether each individual Plaintiff, on every day they worked at

[23] This variability is particularly striking considering that only 2% of the members of the five classes were deposed, responded to interrogatories regarding computer log in and log out times, or provided declarations. Testimony from a larger sample of the classes may show more variability. *See Dukes*, 2011 WL 2437013, at *10 (noting that 120 affidavits, one for every 12,500 class members, did not demonstrate a general policy of discrimination).

Qwest, performed uncompensated work logging in and out of their computer. For example, some class members admit that they were paid for all, or some, of their computer log in and log out time. *See* Fact Section B and C. If Plaintiffs were paid for their time, they do not have any injury for that time period and these Plaintiffs' answer to the central question of whether they worked off the clock is "*not for that claim or not for that time period*."

Without a common injury among all of the Plaintiffs in the classes, the Court should not allow the claims to remain certified. *See Dukes*, 2011 WL 2437013, at *7 (Rule 23(a)(2) commonality requires Plaintiffs to demonstrate that they "suffered the same injury.").

D. Plaintiffs' Allegations Of Qwest's Knowledge Of The Alleged Off-The-Clock Work Vary Significantly.

To the extent that the Plaintiffs allege that a common question with a common answer is "whether Qwest knew of the practice" to require off-the-clock work, this question is not common and does not have a common answer. [2009 Order at 59] Moreover, because there is no common answer to the question of whether there was a classwide policy or practice to require off-the-clock work, logically there cannot be a common question with common answers to the question of "whether Qwest knew of the practice."

Like the pay and promotion decisions in *Dukes*, Consultants were monitored ***locally*** (not at a national or regional level). Where local management has discretion and control over monitoring, the plaintiffs must show that the local management acted in a common illegal way in order to meet the commonality test in Rule 23(a)(2). *See Dukes*, 2011 WL 2437013, at *9. Plaintiffs have failed to do so here.

Indeed, the Court noted this variation in the testimony, stating "[h]ere, some Plaintiffs admit that their managers did not know they were working off the clock or merely surmise that their managers observed them working off the clock." [2009 Order at 69] The evidence shows that this continues to be true. And, with such variance, there is no common answer to the question of "whether Qwest knew of the practice."

In addition to the varying allegations by Plaintiffs, various local managers state that they did not know of an alleged practice to ignore the Qwest's written policies and require off-the-clock work. Instead, they state just the opposite—they did not know of alleged off-the-clock work. Additionally, if these managers saw off-the-clock work, they did something about it. Even if Plaintiffs' allegations are true, then some local managers failed to take action. This shows the local, individualized nature of Plaintiffs' claims. *See supra* Fact Section D.

Moreover, to the extent that Plaintiffs point to the *Moon v. Qwest* litigation and 2005 and 2006 audits to claim that this shows Qwest's corporate knowledge of alleged off-the-clock work, this evidence is not enough to support knowledge of off-the-clock work spanning the certified classes since 2003. First, the audits were limited to their findings of individuals in the Denver call center—neither audit looked at Minnesota, Oregon or Washington call centers.[24] Second, as stated by the Court in its 2009 Order (at 70), "[e]ven if the audit identified actual instances of off-the-clock work, it would still not establish undisputed knowledge as a matter of law for the entire class of Plaintiffs." *See e.g.*, *Pforr v. Food Lion, Inc.* 851 F.2d 106, 109 (4th Cir. 1988) ("[A] plaintiff must show by actual knowledge or by a pattern and/or practice that the employer 'suffered' or allowed the off-the-clock work claimed."); *Bailey v. County of Georgetown*, 94 F.3d 152, 157 (4th Cir. 1996) ("isolated incidents were not sufficient to put the [employer] on notice that, over the three-year period in question, [employees] routinely did not report all of the hours they worked.").

Without significant proof of Qwest's knowledge of the alleged practice to require uncompensated computer log in and out time, Plaintiffs do not have a common answer.

IV. ALLOWING PLAINTIFFS' RULE 23 CLASS CLAIMS TO BE TRIED WITH REPRESENTATIVE DAMAGES VIOLATES THE RULES ENABLING ACT.

The large variability in Plaintiffs' claims (*supra* Fact Section D) demonstrates the problems with using representative damages (or "Trial by Formula") in wage and hour cases. In particular, because of the varied experiences of class members and the large variability in the amount of time claimed, Qwest has different defenses to different Plaintiffs' claims.

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[24] Observations at Denver Consumer Care Center (Dkt. #315, Fleegel Aff. Ex. 52 (filed under seal); Consumer/Small Business System(s) Log-in Time Study (Ex. 42); January 9, 2006 Memo to Al Roberts (Ex. 43).

First, Qwest's has credibility defenses that are individual to Plaintiffs' claims and would be difficult to assert without the ability to cross-examine the individual Plaintiffs. *See Espenscheid v. DirectSat USA, LLC,* No. 09-cv-625-BBC, 2011 WL 2009967, at *7 (W.D. Wis. May 23, 2011) (decertifying FLSA collective class and three state wage and hour classes where it would be hard for the employer to assert various defenses, including the credibility of certain plaintiffs). For example:

- Plaintiff Sharon Stephens claims that she worked 20 minutes off the clock before her shift logging on to the computer.[25] But, Qwest's badge swipe records for Plaintiff Stephens show that, on average, she entered the Qwest building a mere three minutes before the start of her scheduled tour.[26] The badge swipe records likewise do not support Shelly Ahmed, Britt Peterson or Christian Peterson's claims for the amount of time it took to log in to the computer.[27]
- Some Plaintiffs face greater credibility concerns regarding their truthfulness. For example, Plaintiff Matthew Burch left Qwest upon allegations of cramming/slamming, in which he wrote an order for an item a customer had not ordered. Plaintiff Colleen Kist was terminated for

[25] Stephens Dep. 101:1-23 (Ex. 44).

[26] May 16, 2011 P. Gregg Curry Rebuttal/Supplemental Report at 5 (Ex.45).

[27] *Id.*

"gross customer abuse" after several incidents of being rude and abusive to customers.[28]

Second, some Plaintiffs admit they did not perform off-the-clock work on certain days or during part of the class period. Even if a jury found Qwest liable, Qwest should not be required to pay damages if the Plaintiffs have already been compensated. For example:

- Plaintiff Ronald Schneberger admits that after February 2006, he did not work off the clock. [Ex. 5. 73:21-24 and 74:13-25]
- Plaintiff Megan Jeske admits when she was running late she logged in to her phone before she logged into her computer. [Ex. 18 15:9-16:15]

Third, the FLSA as well as the state laws of Minnesota, Colorado, Oregon, and Washington require that Qwest have some knowledge of alleged off-the-clock work.[29] This knowledge is individualized and dependent on local managers. Qwest is entitled to present local managers to defend against each Plaintiff's claim that Qwest had the required knowledge.

By allowing Plaintiffs to provide representative testimony for liability of the class claims, Qwest would not be able to litigate many of these defenses to the individual claims of non-testifying Plaintiffs. Because the Rules Enabling Act forbids interpreting

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[28] M. Burch Dep. 100:5-104:1 (Ex. 46) and Ex. 23. at 12:8-13:6; 14:7-19:4.

[29] Minn. Stat. § 177.23 (defining employ as "permit to work"); Colorado Minimum Wage Order #22 (defining "time worked" as "all the time the employee is suffered or permitted to work"); O.R.S. § 653.010(2) (defining employ as "suffer or permit to work"); and R.C.W. § 49.46.010(3) (defining employ as "permit to work").

Rule 23 to "abridge, enlarge or modify any substantive right," the classes should not remain certified. 28 U.S.C. § 2072(b); *Dukes*, 2011 WL 2437013 at *15 (disapproving of "Trial by Formula" where a sample set of class members would testify and the percentage of the valid claims would be used to determine the entire award to the class).

The Court previously suggested that because "variation in the time spent is not significant" regarding the time for computer log on and log out, a "reasonable amount of time spent conducting these activities can be established at trial and extrapolated to the class." [2009 Order at 27] This would likely require the jury to arrive at some average (or median) hours worked off the clock which then would be used to determine the damages to the class members. But, as discussed above in Fact Section D, the amount of time claimed by the Plaintiffs varies significantly—from a few minutes a day to 35 minutes per day.

Moreover even Plaintiffs' expert, Dr. Stephen Schneider, admits that: (1) there is a "heavy weight" that could be imposed on the damage analysis because of "extreme outliers" in the amount of time claimed by Plaintiffs, (2) he could not find the "typical" amount of time for Plaintiffs' claims, and (3) he would not provide separate estimates of specific computer log in and log out times because it involved making "more assumptions." [Ex. 2 at 56:9-19; 111:2-16, 113:13-114:2] Despite this testimony, Dr. Schneider provided a damage analysis assuming that the median of the estimates provided by a handful of Plaintiffs was the correct number of off-the-clock minutes for each person in the class on each day they worked at Qwest. [*Id.* at 70:12-73:5; *see* *generally* Dr. Schneider's March 7, 2011 Expert Opinion and March 25, 2011 Supplemental Expert Opinion (Dkt. #451, Barr Decl. Ex. 53)]

The "extreme outliers" and "non-typical" times are due to the large variability in the amount of time that Plaintiffs claim to have worked without pay. *See supra* Fact Section D. When combined with the fact that some Plaintiffs admit that they were compensated for some or all of their computer log in and log out time (discussed *supra* in Fact Section D) if Qwest were found liable to Plaintiffs for damages, this would result in paying some Plaintiffs who have already been fully compensated and reducing the awards to others who may be entitled to damages—making the Plaintiffs' claims inappropriate for class treatment.[30] *Espenscheid*, 2011 WL 2009967, at *6 (decertifying a FLSA collective class and three state wage and hour classes less than a month before trial because the court concluded that the use of representative testimony would be "unreliable" in awarding damages and would "make it extremely difficult for defendants to assert their various defenses").

V. PLAINTIFFS' FLSA COLLECTIVE ACTION CLAIMS SHOULD ALSO BE DECERTIFIED.

Collective actions pursuant to FLSA Section 216(b) require the claims of the collective action members to be "similarly situated." For the reasons that the claims of

[30] Moreover, like the plaintiffs in *Espenscheid*, Plaintiffs have not explained how the testifying plaintiffs will be representative of the whole class or who would testify that it is scientifically or statistically appropriate to extrapolate the amount of off-the-clock time from the testifying plaintiffs to the classes without an expert to do so. *Expenscheid*, 2011 WL 2009967, at *5; *see generally* Dr. Schneider's March 7, 2011 Expert Opinion and March 25, 2011 Supplemental Expert Opinion (Dkt. #451, Barr Decl. Ex. 53)]

the putative class members are not common pursuant to Rule 23(a)(2), they are also not similarly situated pursuant to 29 U.S.C. § 216(b). As such, the FLSA collective action claims should also be decertified.

Conclusion

For the reasons stated above, the Court should grant Qwest's motion for decertification of Plaintiffs' FLSA and state law Rule 23 classes, dismiss the FLSA and Rule 23 class members without prejudice and allow the FLSA and Rule 23 class members 60 days from the date of the Court's decision to file individual actions.

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s/Daniel C. Barr
Daniel C. Barr (*pro hac vice)*
M. Bridget Minder (*pro hac vice)*
Jill L. Ripke (*pro hac vice*)
PERKINS COIE LLP
2901 North Central Avenue
Post Office Box 400
Phoenix, Arizona 85001-0400
(602) 351-8000

-- and --

Melissa Raphan (#0182795)
Ryan Mick (#0211960)
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402-1498
(612) 340-2600

Attorneys for Defendants Qwest Communications International Inc., Qwest Communications Corporation, and Qwest Corporation